Nos. 86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al.*,

Appellants,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

—v.—

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND, THE NATIONAL COUNCIL OF JEWISH WOMEN, THE NATIONAL COALITION OF AMERICAN NUNS AND THE INSTITUTE OF WOMEN TODAY, *AMICI CURIAE*.

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INTEREST OF AMICI CURIAE[1/]

This brief amici curiae is submitted, pursuant to Rule 36.2 of the Rules of this Court, by the Women's Legal Defense Fund, the National Council of Jewish Women, the National Coalition of American Nuns, and the Institute of Women Today, and is filed in support of appellee Arthur Frank Mayson.

The Women's Legal Defense Fund is a non-profit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an

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1/ The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

employment discrimination counseling program, and agency advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.

The National Council of Jewish Women ("NCJW") was founded in 1893. It is an organization made up of two hundred sections across the country which are active in advocacy and community service. NCJW is the oldest major Jewish women's organization in the United States and its members are volunteers dedicated in the spirit of Judaism to the advancement of human welfare and the democratic way of life.

The National Coalition of American Nuns is a Chicago-based organization of 2,000 sisters from religious orders throughout the United States. Founded 18 years ago, it is dedicated to studying, speaking about, and working for human rights and social justice.

The Institute of Women Today is a nationwide organization founded fourteen years ago by Catholic, Protestant, and Jewish women's groups. It is dedicated to a search for the religious and historical roots of women's liberation.

Amici believe that religious organizations should not be exempt from Title VII's prohibition against religious discrimination when they are engaged in secular activities. Singling out religious employers for a special exemption that does not apply to comparable employers in the non-profit or profit sector not only has the effect of preferring religious over other employers, but also significantly dilutes Title VII's protections against religious discrimination, has adverse implications for the employment rights of women, and impinges on employees' free exercise rights.

STATEMENT OF THE CASE

Introduction

Plaintiff Mayson is a building maintenance engineer in a public gymnasium owned and operated by the Church of the Latter Day Saints ("the Church").[2/] Because of a broad, prophylactic exception carved out by Congress to Title VII of the Civil Rights Act in 1972, and an analogous exception under Utah law, the Church claims it was legally entitled to require Mayson to choose between his religious beliefs and his job. But it is clear that, in granting statutory exemptions or any other legal entitlement, government may not burden the free exercise rights and interests of some in a constitutionally unnecessary attempt to accommodate the religious interests of others. It is

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[2/] Reference to the Church includes the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints.

irrelevant that a religious institution, and not the state, caused the harm to Mayson; the statutory exception itself, carving out different rules based solely on the religious status of the employer, demonstrates that this case involves more than merely private conduct. And the direct impact of the exemption on the free exercise rights of individuals like Mayson distinguishes the case from those involving free exercise claims which have no such effect. Compare Estate of Thornton v. Caldor, Inc., 105 S.Ct. 2914 (1985) (impact of statute on non-believers violates Establishment Clause) with Wisconsin v. Yoder, 406 U.S. 205 (1972) (no impact on identifiable non-believers).

Appellants' arguments, relying on the free exercise interests of the Mormon Church, and viewing the case as involving only private conduct, ignore the fact that any benefits accruing to the Church are obtained

in reliance on the statutory exemption and are received only at the cost of Mayson's free exercise rights.

Statement of the Facts

This case involves a church which, although not compelled to do so by its religious doctrine, has elected to own and operate a public gymnasium. The Deseret Gym ("Gym") solicits membership from the public at large, 549 F.Supp. at 801,[3/] through advertisements which do not refer to any religious affiliation, R.X1 at 42-44.[4/] Nothing about its operation suggests a religious character. In addition to traditional gymnasium facilities, this gym also offers many features of a modern health

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[3/] References to 549 F.Supp. 791 (D. Utah 1984), and 618 F.Supp. 1029 (D. Utah 1985), are to the published district court opinions in this case.

[4/] Citations to the record are to the volume number and page.

club or spa: barber and beauty shops, massage salons, and a snack bar. 594 F.Supp. at 801. Smoking is permitted in certain areas, id., even though religious doctrines of the Church prohibit tobacco for Church members, Brief For Appellants in No. 86-179 at 4 n.7 ("C.P.B. Brief"). The Gym has a history of employing non-Mormons and unobservant Mormons and continues to employ Gulmast Khan, a non-Mormon, as squash instructor and manager of the pro shop. R. II at 123; XI at 57, 162-63; III at 135-36.

Appellee Mayson was employed for sixteen years as a building maintenance engineer at the Gym. R.II at 121. There is no dispute that he performed his duties in a fully satisfactory, if not admirable, fashion. See 594 F.Supp. at 796, 802. His job entailed no religious duties, id. at 802, and no religious criteria had ever been imposed on Mayson until 1980, when he was informed that

he would be terminated if he failed to qualify for a "temple recommend."[5/] Mayson, a Mormon, objected to these requirements that, among others things, he attend church every Sunday and pay ten percent of his gross income as a tithe to the Church. He was fired when he refused to comply. 594 F.Supp. at 796.

Mayson filed charges of religious discrimination and subsequently filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended ("Title VII"). The Church moved to dismiss or in the alternative for summary judgment, on the ground that the challenged employment practices were exempt pursuant to §702, 42

5/ Temple recommends are given only to members who tithe, attend church regularly, and abstain from coffee, tea, alcohol and tobacco. C.P.B. Brief at 4 n.7. The Church concedes that conditioning employment on temple recommends is not based on religious belief; instead, the requirement is merely "administratively convenient." Id.

U.S.C.§2000e-1, which provides, in pertinent part:

> This subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Mayson principally contended that, as applied to him, the exemption violated the Establishment Clause because it had the effect of establishing or endorsing religious employers in their secular activities, while burdening his free exercise rights because it forced him to make a choice between his job and his beliefs.

On the basis of uncontested facts and affidavits, the district court made a factual finding that the Gym's "primary function is to provide facilities for physical exercise," and that "nothing in the running or purpose

of [the Gym] suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration." 594 F.Supp. at 800-01. The court also found that none of Mayson's duties was even tangentially related to any religious belief or ritual of the Mormon Church. Id. at 802. It therefore concluded that there was no evidence to even "remotely suggest" that a religious tenet of the Mormon Church necessitated Mayson's termination. Id. at 818.[6/]

Pursuant to these factual findings, the district court held that no free exercise rights of the Church were implicated in this

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[6/] In this connection, the court also noted that in an application for a broadcasting license, the Church had represented its belief to the F.C.C. that "it is 'morally evil' to deny anyone the right to employment...." In re Chronicle Broadcasting Co., 59 F.C.C.2d 335, 337 (1976). 594 F.Supp. at 818.

case and that no constitutional injury would result if the exemption from general employment discrimination prohibitions did not apply to Mayson's termination. The lower court then held that application of the exemption to Mayson would have a constitutionally impermissible effect of establishing religion, and ordered judgment for Mayson, including back pay. The Church did not oppose his reinstatement. 618 F.Supp. at 1029.

The Church essentially contended in the court below, as in this Court, that its pervasive religious doctrine infuses all its actions with religious significance and justifies the expansive exemption granted by §702. While there is no doubt that the Church and its adherents are fully entitled to a belief in the inseparability of the religious and the secular, the implications of this contention reach far beyond the

private sphere of belief and worship protected by the Free Exercise Clause. The Church is involved in a variety of activities which are ordinarily undertaken by secular, profit-making organizations, including radio and television broadcasting, commercial real estate, stock and bond investing, insurance underwriting, and agriculture. J. Heinerman & A. Shupe, The Mormon Corporate Empire, 46-125 (1985). In 1983, total assets of the Church were estimated to be 7.89 billion dollars.[7/] As the largest private property owner and one of the largest employers in

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[7/] J. Heinerman & A. Shupe, supra, at 125 (1985). The Mormon Church would thus rank thirty-second in assets on the list of "Fortune 500" industrial companies, ahead of Xerox Corporation, which had 7.66 billion dollars of assets on December 31, 1982. Fortune Magazine, May 23, 1983, at 22. Although the Mormon Church is obviously one of the "world's ... most economically prosperous religious organizations," N.Y. Times, February 11, 1987, at 20, col. 3, some other religious sects similarly have the wealth and inclination to acquire substantial pieces of the secular economy. See generally M. Larson & C. Lowell, The Religious Empire (1976); D. Robertson, Should Churches Be Taxed, 113-38 (1968).

Utah, the Church's extensive economic interests give it substantial control over the economic life of the state. Id. at 92, 122; M. Larson & C. Lowell, Praise the Lord for Ta: Exemption, 203-09 (1969). The claim for exemption thus implicates large numbers of jobs with no religious content, except that invested by virtue of the Church's belief that religion should pervade its members' lives.

SUMMARY OF ARGUMENT

Had Mayson been employed by any other public gymnasium, unaffiliated with a church entity, his termination for failure to meet a religious test of faith would assuredly violate Title VII. That Act was intended to provide comprehensive protection against employment discrimination. Indeed, as revealed in the Congressional debates over both the current exemption, at issue in this

case, and its predecessor, an exemption from coverage for religious employers was promoted as constitutionally necessary to meet the free exercise interests of such employers. It is incontrovertible that religious employers engaged in religious activity have such interests which, even without a statutory exemption, are entitled to extraordinary deference under First Amendment standards. See, e.g., Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985), cert. denied, 106 S.Ct. 3333 (1986). However, religiously-affiliated employers who undertake activities that have little or no relationship to spiritual or ecclesiastical concerns occupy a vastly different position with regard to any attempt to be relieved of the obligations imposed on all other similar employers.

If the Catholic Archdiocese of New York purchased the New York Yankees, would it be

entitled to fire all players who are not Catholic, or those Catholics who do not attend mass? The answer of the Mormon Church in this case would be yes. But it is clear that the First Amendment affords no such right and equally clear that the architects and enacters of the Title VII exemption did not contemplate its use in such a fashion. See Point I, infra. Even if they had, it would still be the province of this Court to hold that such a constitutionally unnecessary preference to religion results in both an impermissible establishment of religion and in the denial of free exercise rights of individuals, like Mayson, suffering from religious discrimination. The effects of the exemption on third parties, like Mayson, create an insuperable Establishment Clause barrier to application of the exemption in this situation, Estate of Thornton v. Caldor, Inc., supra, and other financial and symbolic

effects indicate that the exemption operates here to benefit and endorse religion. Tony and Susan Alamo Foundation v. Sec'y of Labor, 105 S.Ct. 1953 (1985). See Point IIA, infra.

Application of the exemption to secular employment by religiously-affiliated employers will not entangle government in religious matters, since secular employment by definition is not a religious matter. The determination as to what is secular and what is religious does not create an "entanglement" problem within the meaning of the Establishment Clause. It is the function and duty of courts and agencies, not unreviewable religious bodies themselves, to determine entitlements to exemptions and constitutional protections. That process inevitably necessitates an initial separation of the religious from the secular. This is the very essence of First Amendment jurisprudence and creates no entanglement problems as evidenced

by the numerous and various circumstances in which this Court has undertaken and upheld such inquiries. See Point IIB, infra.

The district judge was well within his discretionary power to award Mayson a "make-whole" back pay remedy. The award was not punitive but simply provided Mayson with wages actually lost as a result of his discriminatory termination. Its payment could cause no hardship to the Church, but its denial could severely affect Mayson. See Point III, infra.

ARGUMENT

I. THE RELIGIOUS EMPLOYER'S EXEMPTION UNDER TITLE VII WAS NEVER INTENDED TO AUTHORIZE THE KIND OF DISCRIMINATION WHICH OCCURRED IN THIS CASE, AND THE EMPLOYER IN THIS CASE HAS NO CONSTITUTIONAL ENTITLEMENT TO AN EXEMPTION FROM FEDERAL ANTI-DISCRIMINATION LAW

A. The Exemption For Religiously-Affiliated Employers Was Never Contemplated To Apply To Clearly Non-Religious Employment In A Public Gymnasium Merely Because A Church Owns The Facility

Title VII embodies a national policy to repudiate and eradicate the historical tolerance of discrimination in private employment on the basis of race, color, sex, national origin, and religion.[8/] Although

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[8/] For this reason, the Church's repeated invocation of the "first 175 years of our nation's history," (C.P.B. Brief at 12, 16, 41) is of little moment in this case, even though an "unambiguous and unbroken" historical practice has been sometimes important in the Court's Establishment Clause adjudication, Marsh v. Chambers, 463 U.S. 783, 792 (1983); see Walz v. Tax Commissioner, 397 U.S. 664, 678 (1970). Cf. Bob Jones University v. U.S., 461 U.S. 574, 604 (1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination in education--discrimination that prevailed, with official approval, (footnote cont'd)

religious employers, like other employers, are covered by Title VII's general prohibitions against discrimination on the basis of race, color, sex or national origin,[9/] Congress recognized that they required certain accommodation to their legitimate religious concerns and accomplished this in various ways. The statute originally exempted employees of a religious employer performing "work connected

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for the first 165 years of this Nation's Constitutional history").

[9/] E.g., E.E.O.C. v. Fremont Christian School, 781 F.2d 1362 (9th Cir. 1986); E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d 1272 (9th Cir. 1982); E.E.O.C. v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); E.E.O.C. v. Mississippi College, 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981); Ninth & O Street Baptist Church v. E.E.O.C., 616 F.Supp. 1231 (W.D. Ky. 1985), aff'd mem., 802 F.2d 459 (6th Cir. 1986); Dolter v. Wahlert High School, 483 F.Supp. 266 (N.D. Iowa 1980); Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F.Supp. 1363 (S.D.N.Y 1975); see Russell v. Belmont College, 554 F.Supp. 667 (M.D. Tenn. 1982) (Equal Pay Act); cf. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). These cases reject the employers' contentions that application of Title VII to religious employers violates the Religion Clauses of the First Amendment.

with the carrying on ... of its religious activities." 42 U.S.C. §2000e-1 (1964) (emphasis added). Title VII also permits such employers to use religious criteria in their hiring practices whenever such criteria could be justified as a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise..." 42 U.S.C. §2000e-2(e)(1).[10/] In addition, the lower courts have uniformly declined to enforce Title VII standards to regulate the relationship between a church and its ministers or employees performing minister-like responsibilities.[11/]

[10/] The Church has never claimed that religion is a BFOQ for the job at issue in this case. Arguably, the BFOQ provision provides the only defense for the Church's discrimination against Mayson, since the exemption entitles them only to hire persons "of a particular religion," a qualification Mayson meets.

[11/] See Rayburn v. General Conf. of Seventh-Day Adventists, supra; McClure, supra.

In 1972, the exemption for religious employers was expanded by permitting them to employ persons "of a particular religion" in any of their activities. The exemption evolved from debates and proposals which focused largely on a comprehensive exemption for schools and religious employers. Amendment No. 815 to S.2515,[12/] proposed by Senators Ervin of North Carolina and Allen of Alabama would have exempted schools and religious organizations from all of Title VII's requirements. The sponsors of the amendment claimed that it was constitutionally required. Senator Ervin repeatedly adverted to the necessity to maintain a "wall of separation" between church and state, Leg. Hist. at 1217, 1221, 1231, and to keep the "political hands of Caesar" off all religious

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12/ H.R. 1746, P.L. 92-261, Committee Print prepared for the Committee on Labor and Public Welfare (1972), reprinted in Legislative History of the Equal Employment Opportunity Act (hereafter "Leg. Hist."), p. 881.

institutions. See, e.g., id. at 1230. Senator Allen likewise characterized the amendment as constitutionally necessary: "the constitutional standard is separation of church and state. And so far as interference with the 'free exercise' of religion, the separation must be full and complete. The first amendment prohibition is absolute." Id. at 1255.[13/]

Notwithstanding the claim that this comprehensive exemption was constitutionally required, the Senate rejected it by a vote of 55 to 25. Subsequently, the same sponsors offered another amendment, No. 809, which contained a substantially narrower exemption and was adopted as §702 with little

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13/ Sen. Allen was also particularly concerned about the impact of the Civil Rights Act on Southern schools. See Leg. Hist. at 853, 1254.

debate.[14] As a result, the legislative history, which is largely limited to the remarks of four senators,[15] and which primarily addressed the comprehensive exemption for all schools and religious employers and for all forms of discrimination, indicates little about the purpose of most legislators in accepting the narrower provision. What is clear from the debates was that the sponsors of the exemption urged it upon fellow legislators on the theory that it was constitutionally compelled. Clearly, the majority did not concur with regard to total exemption; it is unclear whether Amendment No. 809 was adopted because of

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[14] Virtually all the legislative history cited by appellants addressed the comprehensive amendment, No. 815, which was not enacted.

[15] Senators Ervin spoke at length and quoted lengthy opinions of this Court; Senator Allen spoke in general concurrence with Sen. Ervin. The sponsors of the bill, Sens. Williams and Javits, asked a few questions. Senator Stennis made a brief statement in opposition.

perceived First Amendment requirements or because of political compromise or other reasons.[16/] The debates display little or no recognition that establishment problems or free exercise concerns of employees might be implicated by an overly-solicitous accommodation for religious employers.[17/] Thus, the debates do not reflect how Congress would have balanced competing commands of the two Religion Clauses. Indeed, there was no

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16/ The assertion in appellants' briefs, C.P.B. Brief at 23, U.S. Brief at 21-22, that Congress may accommodate religion in ways which exceed the requirements of the Free Exercise Clause, as an abstract proposition, is not at issue here. There is no indication in the legislative history that that was the Congressional intent. While the proposition that accommodation may exceed free exercise rights may be generally true, it is, of course, not the case when that accommodation burdens free exercise rights of individuals and effectuates an establishment of religion. See Point IIA, infra.

17/ Senator Williams alone acknowledged that "it might very well be unconstitutional for Congress to permit such discrimination," referring to exempting religiously-affiliated public hospitals. Leg. Hist. at 1250. See also id. at 852 (similar comment by Sen. Williams in discussion of Amendment No. 809).

recognition that a religious employer might receive "unnecessary" benefits, tantamount to establishment, or that such an employer might use the exemption so as to deprive employees of their own rights of conscience.[18/]

Appellants posit that §702 was expanded in order to prevent entanglement of the EEOC and trial courts in determinations as to what constitutes "religious activity." This was

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[18/] Senator Ervin expressed his opinion that churches and religious employers were constitutionally entitled to complete exemption for their hiring activities, even for positions such as secretary or janitor. Leg. Hist. at 1223. The Senate rejected this proposition when it voted against the comprehensive amendment and voted to continue to impose the prohibition against race, national origin and sex discrimination. Even if this were not the case, the examples cited by Senator Ervin all involve actual employment by a church in its own usual activities (maintenance of church property and church fundraising). Nowhere in the legislative history of Amendment 809 is there a recognition of the possibility that churches might venture into activities which, as a result of history, tradition and common sense, can only be called secular. The closest example is Sen. Ervin's statement that he would exempt a distillery operated by a religious order. Leg. Hist. at 1230. This comment likewise occurred in discussion of Amendment No. 815, which was rejected.

not a Congressional purpose,[19] nor has this kind of inquiry proved troublesome or entangling in fact. Judges and administrative personnel are frequently required to determine whether an activity is religious and therefore entitled to regulatory, statutory or constitutional protections. That inquiry is not only permissible, it is the very essence of First Amendment jurisprudence. Cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools, 106 S.Ct. 2718 (1986).

Title VII caselaw displays the relative ease with which constitutional parameters in this area can be, and have been drawn. The courts have evaluated claims for exemption arising in a variety of contexts. For

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[19] There is no reference in the legislative history to any actual entanglement problems arising from EEOC investigations or court cases. Prior to 1972, the only reported decision analyzing §702 was McClure v. Salvation Army, supra.

example, in E.E.O.C. v. Southwestern Baptist Theological Seminary, supra, the court carefully distinguished between those employed by a seminary who performed "minister-like" functions and those (such as support and administrative staff) who did not. 651 F.2d at 283-85. Indeed, the court found no First Amendment obstacle to requiring a church seminary to comply with relevant Title VII data compilation and reporting requirements for non-ministerial positions, even though the seminary had a demonstrated preference for having ordained ministers perform such functions. In E.E.O.C. v. Mississippi College, supra, the Fifth Circuit concluded that the "ministerial" exemption did not extend to all teachers at a religious college, whose employment was not strictly a matter of "ecclesiastical concern." 626 F.2d at 485. And in E.E.O.C. v. Pacific Press, supra, the

Ninth Circuit easily concluded that a secretary at a religious book publishing house was covered by Title VII. In these and other Title VII cases, the courts have emphasized the absence of any Establishment Clause obstacle to the limited involvement in religious affairs that the exercise of EEOC "jurisdiction" ordinarily entails. Each court concluded that, although applying Title VII in such contexts requires some church-state contact, there was no excessive entanglement involved in the record-keeping[20/] and single-incident investigations that are the most Title VII enforcement ordinarily requires.

20/ This Court recently held that similar or greater record-keeping and reporting requirements of the Fair Labor Standards Act do not generate undue church-state entanglement. Tony and Susan Alamo Foundation v. Sec'y of Labor, supra.

These and other cases[21/] indicate that courts and agencies may, and routinely do, separate the religious from the secular and evaluate claims of religiously-affiliated employers for exemption from laws and regulations. This process in the Title VII area in particular does not create excessive entanglement problems. No such concern motivated Congress to enact the exemption at issue here, nor, contrary to what the Church urges, would it justify an application of the exemption that has other constitutional infirmities.

21/ See Point IIB, infra, for a review of other areas in which courts and agencies examine religious exemption claims without problems of excessive entanglement by government in religion.

B. The Record In This Case Is Devoid Of Any Evidence That A Free Exercise Right Of The Church Will Be Violated If Federal Anti-Discrimination Law Is Applied To Mayson's Dismissal

"[T]he Free Exercise Clause's protection of religious beliefs and of the Church as an institution," C.P.B. Brief at 18, does not require an exemption from Title VII's prohibition of religious discrimination in this case. The Free Exercise Clause's protection for churches is broad but not unlimited. See U.S. v. Lee, 455 U.S. 252, 257 (1982). It encompasses the Church's freedom to carry on religious activities, to build churches and schools, conduct worship services, pray, proselytize, teach moral values, select its own leaders, define its own doctrines, resolve its own disputes, and run its own religious institutions.[22/] In

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22/ See Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Colum. L. Rev. (footnote cont'd)

essence, the focus of the Free Exercise Clause is on the right of the Church to interact with its adherents on matters relating to religion without state interference. The Free Exercise Clause does not require that "doctrines of religious belief [be] superior to the law of the land," Reynolds v. U.S., 98 U.S. 145, 25 L.Ed. 244, 250 (1879), and when a religious organization chooses to engage in "commercial activity," it must ordinarily follow the "statutory schemes which are binding on others in that activity." U.S. v. Lee, 455 U.S. at 261.

The district court found that there was no evidence to even "remotely suggest that the Mormon Church holds any religious tenet that requires all persons employed by its corporate entities in secular, non-religious activities to be templeworthy Mormons." 594

1373, 1388-1389 (1981) and cases cited therein.

F.Supp. at 818.[23/] A preference for employing observant Mormons may well be "consistent" with the Church's beliefs, C.P.B. Brief at 20, but that falls far short of a claim that such a practice is compelled by sincere religious conviction. It is only the latter situation which is entitled to deference under the Free Exercise Clause. Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("to have the protection of the Religion Clauses, ... claims must be rooted in religious belief"); Tony and Susan Alamo

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[23/] The absence of any Church doctrine that compels religious preference hiring at the Gym is manifested by the thin evidence put forth by the Church. In its attempt to imbue the Gym with a religious aspect, the Church primarily relies on the 1910 dedicatory prayer. C.P.B. Brief at 7. To support its doctrine of individual self-sufficiency, the Church cites a 1936 Church Conference Report. Id. at 5. It is noteworthy that 1936 was an election year and that supporters of Alf Langdon used the just-announced Mormon plan of individual self-sufficiency, with its concomitant emphasis on refusal to accept government welfare benefits as a campaign tactic against the New Deal's government assistance programs. J. Heinerman & A. Shupe, supra, at 185.

Foundation v. Sec'y of Labor, 105 S.Ct. at 1963 (constitutional protection dependent on whether government "actually burdens the claimant's freedom to exercise religious rights").

The Church has never asserted this type of claim, 594 F.Supp. at 818, nor would such an assertion be persuasive. The Gym advertises without reference to its religious affiliation and it attracts both Mormons and non-Mormons. Patrons at the Gym may engage in conduct of which the Church disapproves on religious grounds, such as smoking. See 594 F.Supp. at 801. The Gym has a history of employing non-Mormons and unobservant Mormons; the imposition or enforcement of the requirement in 1980 that Mormon employees be eligible for a "temple recommend," was a clear departure from prior practice which was not supported or explained by reference to any doctrinal developments which necessitated

this change in the Gym's employment practices. Nowhere does the Church suggest that its members must attend the Gym, that such attendance constitutes a religious act, or that any religious significance gym attendance may have is destroyed or diminished by the presence of non-Mormon employees or employees ineligible for a "temple recommend." See 594 F.Supp. at 801. Indeed, as the district court found, the record lacks any evidence or explanation of its policy which would qualify it as a sincerely and deeply held religious conviction entitled to First Amendment protection.

II. THE TITLE VII EXEMPTION FOR RELIGIOUS EMPLOYERS AS APPLIED TO A BUILDING MAINTENANCE ENGINEER IN A PUBLIC GYMNASIUM VIOLATES THE ESTABLISHMENT CLAUSE AND ADVERSELY AFFECTS THE EMPLOYEE'S RIGHT TO FREEDOM OF CONSCIENCE

The Court has consistently accommodated both the "autonomy and freedom of religious bodies while avoiding any semblance of established religion," Walz v. Tax Commission, 397 U.S. at 672, by examining a statute's purpose, determining that its principal or primary effect is neither to advance nor inhibit religion, and assuring that the statute does not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); see Walz v. Tax Commission, 397 U.S. at 669.[24/]

[24/] The Lemon factors have been used by this Court as guidelines in at least 15 First Amendment cases. The only departures are in Marsh v. Chambers, supra (two centuries of an unbroken and unambiguous historical practice) and Larson v. Valente, 456 U.S. 228 (1982) ("strict scrutiny" standard applied to a statute which was patently discriminatory on its face).

The purpose of any Congressional attempt to accommodate religion is obviously religious to some extent, see Wallace v. Jaffree, 105 S.Ct. 2479, 2504 (1985) (O'Connor, J., concurring); but that is not enough to render a statute unconstitutional. Neither is it true, however, that every legislative attempt to accommodate religion must be deemed, because the purpose is laudable, to be per se constitutional. Rather, "[t]he solution ... lies ... in identifying workable limits to the government's license to promote the free exercise of religion." Id. Where, as here, the legislature exempts only religious entities and exceeds what was necessary to accommodate their legitimate free exercise interests, and the effect is to advance or endorse religious activities at the expense of the individual's freedom of conscience, fundamental Establishment Clause principles are affronted.

A. The Exemption Is Unconstitutional Here Because Of Its Effects On Mayson's Freedom Of Conscience And The Advantages Flowing To The Church

1. The Effect on Mayson's Right to Freedom of Conscience

This Court has on several occasions "identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment." E.g., Wallace v. Jaffree, 105 S.Ct. at 2487. As the facts of this case demonstrate, §702 enables employers to coerce religious loyalty from their employees in violation of fundamental First Amendment principles. Jefferson's famous "Bill for Religious Liberty," enacted in slightly different form by the Virginia Legislature in 1786, declared that "even forcing [any man] to support this or that teacher of his own religious persuasion" offends an individual's

right to freedom of conscience.[25/] Mayson was told he would lose his job unless he attended church and paid a tithe. See, e.g., Affidavit of Arthur Mayson, dated August 16, 1983. A religious employer's ability to coerce employees into religious observance through a religion-conscious statutory exemption constitutes an unconstitutional effect. See United States v. Lee, 455 U.S. at 261.

Only last year this Court held that a statute which has a similar impact on third parties has the effect of impermissibly advancing religion. Estate of Thornton v. Caldor, Inc., supra. Section 702 distinguishes between religious and nonreligious employers and employees and in so doing, seriously burdens the non-

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25/ Cited in Everson v. Board of Education, 330 U.S. 1, 13 (1947); See L. Levy, The Establishment Clause: Religion and the First Amendment, 53-54, 58-60 (1986).

religious. Thornton teaches that religion may not be accommodated in an absolute manner that burdens others; when "[t]the State ... commands that ... religious concerns automatically control over all secular interests at the workplace," the Establishment Clause is violated. 105 S.Ct. at 2918.

The statutory infirmities recognized in Thornton are present here as well. That statute granted concrete benefits and preferred status to Sabbath observers, over all others. As a result, employees may well have been induced to become Sabbath observers in order to obtain this benefit, but those who, out of conscience, refused would be penalized in having their needs for time off considered last. Similarly, many of the Church's employees may well have yielded to the pressure to become "templeworthy" simply to keep their jobs. Those, like Mayson, who resisted as a matter of personal conscience,

have suffered loss of employment, an even more severe consequence than could have flowed from the Connecticut statute. Section 702 compounds the injury by granting preferences to religious employers, as well. They, like the Sabbath observers, enjoy a preferred status from which they reap concrete financial and competitive advantages. See Point IIA-2, infra.

This Court has upheld religious exemptions from laws of general applicability only when the exemption does not burden the religious liberty of others. Walz v. Tax Commission, supra; Gillette v. United States, 401 U.S. 437 (1971). While the exemption for non-profit organizations at issue in Walz may have required all non-exempt taxpayers collectively to shoulder additional tax burdens, it did not infringe their religious liberties. Similarly, upholding military service exemptions in Gillette for individuals with

religious or moral objections to war had no effect on the religious liberty of individuals with no such beliefs.

2. The Exemption Gives Religious Organizations Advantages Over Non-Religious Employers In The Secular Economy

As a direct result of the exemption for religious organizations, the Church is empowered to extract from employees substantial economic concessions. One of the reasons for Mayson's termination was his noncompliance with the Mormon Church's tithing requirement. There is no question of the Church's right to impose a tithing requirement--or any other requirement--on freely-consenting members. However, the ability to coerce the return of ten percent of an employee's gross income gives church-owned businesses an obvious competitive and financial advantage over non-religiously-owned ones. As this Court noted in Tony & Susan Alamo Foundation v. Sec'y of Labor,

supra, 105 S.Ct. at 1961, "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors ... and the admixture of religious motivations does not alter a business's effect on commerce."

A statutory exemption which empowers employers to coerce obedience through economic threats offends a fundamental constitutional principle. The First Amendment is premised on the notion that each religion will succeed, not as a result of government pressures or inducements but on the intrinsic appeal of its beliefs to people who are free to choose. "We sponsor an attitude on the part of Government that... lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma". Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). This premise is undermined if secular employment becomes a

reward for the faithful. The potential for such abuse is apparent. See Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra; Tony & Susan Alamo Foundation v. Sec'y of Labor, supra. Section 702 would expand the coercive powers of such employers. For example, the tithing requirement could reduce a minimum wage employee's wages below the statutory level. This may constitute an impermissible delegation of legislative authority, see Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), and would subvert this Court's ruling in Alamo. Even if the violation does not rise to that level, the examples demonstrate the power accorded religious employers under the exemption, a power denied other similarly situated employers.[26/]

[26/] The relative infrequency of cases like this one suggests that either the coercive power granted employers is highly successful, or that religious employers voluntarily forbear from exercising that (footnote cont'd)

The Church obtains approximately three-quarters--an estimated 1.5 billion dollars in 1983--of its income from the tithing requirement. J. Heinerman & A. Shupe, supra, at 102. Enforcement of that requirement is critical to the Church's continued economic growth. The §702 exemption thus gives this and other religious employers a powerful tool to expand their influence into secular economic activity, and correspondingly the political and social life of the community.27/

The Church's claim that it may not only discriminate on the basis of religion in all

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power, since it is not necessary to their religious integrity. Some support for this latter proposition can be found in the fact that thirty-two religious organizations opposed the Ervin-Allen proposal to exempt religious organizations from Title VII coverage altogether. Leg. Hist. at 1253.

27/ The danger is not confined to Utah or to this Church. Other churches and sects likewise have extensive economic holdings, or power in a particular community, and could decide to exercise their rights if the expansive interpretation of §702 is upheld.

its employment, but that it may impose religious criteria, other than membership, on employees or applicants, would increase the power of religious employers under §702 in a way which has particular relevance to the employment of women. For example, the Mormon Church actively encourages women to forego employment in favor of remaining at home to care for children,[28/] it precludes women from acting as lay priests,[29/] and it provides that only women whose husbands are members of the priesthood can enter the highest heaven. Id. at 227. One member was excommunicated by the Church in 1979, in part for her vocal support of the Equal Rights Amendment and criticism of the Church for its

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28/ J. Heinerman & A. Shupe, supra, at 227-29 (women encouraged in Church literature and by public speeches of church elders to assume traditional roles).

29/ Id. at 227. All observant male Church members over the age of 12 can be priests. Until 1978, blacks were denied entry into the priesthood, as women still are. Id. at 223.

opposition.[30] Just as Mayson was fired for failing to qualify for a "temple recommend," women could be fired from completely secular jobs for failing to adhere to sex discriminatory doctrines; important secular positions could be reserved for members of the priesthood, by definition male, or for those eligible to enter the highest heaven, and the like. In a state like Utah, a woman's employment opportunities would thereby be dramatically limited. If other fundamentalist religions took similar advantage of the broadly stated exemption, the employment opportunities of women could be significantly diminished[31]--all in the name of religious

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[30] Id. at 201-02.

[31] Some religious employers have already tried to fire new mothers on a religiously-based assertion that a mother of young children should not work outside the home. See Ohio Civil Rights Commission v. Dayton Christian Schools, supra. Other religious employers have cited biblical authority that the husband is the "head of household" to justify denial of fringe benefits to married female employees, E.E.O.C. v. (footnote cont'd)

freedom, even where an employer has no constitutionally protectable right. For example, a nursing home owned by or affiliated with an Orthodox Jewish temple could fire nurses who did not participate in ritual baths.

As in Thornton, the exemption here singles out religious groups for special and absolute protection, and thereby "conveys a message of endorsement." 105 S.Ct. at 2919 (O'Connor, J., concurring). The exemption conveys a clear message of government facilitation and approval of practices which benefit and advance religion, by coercing religious loyalty and penalizing non-believers. The symbolic effects here

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Fremont Christian School, 781 F.2d at 1364, and have cited scriptures to rationalize hiring only males to teach religion courses, E.E.O.C. v. Mississippi College, 626 F.2d at 487 & n.12 ("pervasively sectarian" college owned by Baptist Church). See also E.E.O.C. v. Pacific Press Pub. Ass'n, 676 F.2d at 1275 (female employees of press owned by Seventh-Day Adventist Church paid less than male employees).

contrast sharply to those in Walz v. Tax Commissioner, supra, where the exemption from property tax did not single out religious organizations, but applied to all non-profit organizations.

B. Protecting Mayson Against Discrimination Will Not Cause Entanglement Problems

The Church proposes that the Lemon factors be abandoned in exemption cases in favor of an exclusive focus on entanglement. This unusual suggestion not only lacks precedent, but also fails to provide any meaningful "limits to the Government's license to promote the free exercise of religion." Wallace v. Jaffree, 105 S.Ct. at 2504 (O'Connor, J., concurring). Under this approach accommodation of religion would almost always be upheld, notwithstanding effects even of a constitutional dimension, because exemption would almost always be less entangling than regulation.

This approach cannot be reconciled with this Court's precedents. The proposal presumes that neutral rules which apply to religious groups, along with everyone else, are per se entangling and constitutionally infirm under the Establishment Clause. For instance, an exemption for religious groups that believed in human sacrifice from state criminal laws prohibiting murder would qualify under the Church's test. But see Reynolds v. U.S., 25 L.Ed. at 250. Exemptions for all religious organizations from minimum wage and other labor laws, regulations and codes would likewise survive scrutiny. But see Tony & Susan Alamo Foundation v. Sec'y of Labor, 105 S.Ct. at 1953.

Second, the Church's novel proposition, dubbed the "Walz-Gillette Analysis of Express Exemptions," C.P.B. Brief at 29, follows neither Walz v. Tax Commissioner, supra, nor

Gillette v. United States, supra. Although decided before Lemon, both Walz and Gillette analyzed the purpose and effect of the exemption as well as the potential for entanglement. Walz, 397 U.S. at 669; Gillette, 401 U.S. at 450. Walz sustained religious property tax exemptions in large part because the exemption was not explicitly based on religion but instead applied to a "broad class of property owned by nonprofit, quasi-public corporations...." 397 U.S. at 673. In Walz there was also a long historical tradition of exempting such property from property tax. Id. at 676-78. Moreover, Walz demonstrates that there are no entanglement problems in confining the Church's exemption to its religious activities: "[I]n Walz, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship." Lemon v. Kurtzman, 403

U.S. at 614 (emphasis added). In Gillette the Court first found no sectarian purpose nor effect in a limited conscientious objector exemption, and only then discussed potential entanglement problems arising because of a perceived likelihood of fraudulent claims, i.e., that it would be impossible to separate political from religious objections to a particular war. The Court also expressed deference to Congress regarding its management of military affairs. Cf. Goldman v. Weinberger, 106 S.Ct. 1310 (1986) and Rostker v. Golberg, 453 U.S. 57 (1981) (deference to military).

The Church, in characterizing this as an "express exemption" case like Walz and Gillette, as to which it posits that entanglement considerations must prevail, attempts to categorize this case and the Court's precedents in a way which distorts both. It is telling that the Church has

failed altogether to cite Estate of Thornton v. Caldor, Inc., supra, one of this Court's most recent Establishment Clause cases and the case most similar in its facts to the present case. Thornton demonstrates that entanglement considerations are not necessarily paramount where accommodation to religion implicates other protected rights; where rights of third parties are infringed, the "effects" element of the Lemon analysis becomes critical: "this unyielding weighting in favor of Sabbath observers over all other interests ... has a primary effect that impermissibly advances a particular religious practice." 105 S.Ct. at 2918.

The Church's suggestion that any First Amendment exemption challenge should be resolved so as to produce the least government entanglement not only ignores the impact of the exemption on innocent third parties, see Point IIA-1, supra, but also

grossly overstates the difficulties associated with governmental evaluation of religious claims for exemption. Since at least 1886, as illustrated by Gibbons v. District of Columbia, 116 U.S. 404 (1886), which denied tax exemption to church-owned land, used not for religious purposes but rather to produce income, administrative agencies and courts have routinely distinguished between religious and secular activities of religious organizations. Indeed, the inquiry into whether religious organizations are operating in the religious or secular realm is performed in a wide variety of contexts.[32/]

[32/] See, e.g., Tony & Susan Alamo Foundation v. Sec'y of Labor, supra (applying Fair Labor Standards Act to commercial activities of religious entity); California v. Grace Brethren Church, 457 U.S. 393 (1982) (exemption from unemployment tax under 26 U.S.C. §3309(b) only when the organization is operated "primarily for a religious purpose"); Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B., 732 F.2d 769, 773 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious hospital that (footnote cont'd)

This Court has never held that, for purposes of determining an entitlement to exemption under the First Amendment, the mere inquiry into whether an activity is religious or secular by itself constitutes excessive entanglement. The First Amendment does not authorize religious organizations to decide unilaterally that their activities shall be exempt from government regulation. In this, as in other closely analogous situations, it is the province of the courts, not of unreviewable church-related bodies, to determine "what the law is." Marbury v. Madison, 5 U.S. 137 (1803). See also United States v. Nixon, 418 U.S. 683 (1974) (jurisdiction of courts, not executive, to assess validity of claim of executive privileges).33/

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functions "in essentially secular fashion").

33/ Any other rule would improperly delegate the authority of the state to church officials. See Larkin v. Grendel's Den, Inc., supra.

Indeed, government routinely scrutinizes claims for religion-based exemptions arising from a myriad of circumstances without entanglement problems. See, e.g., Bob Jones University v. United States, supra (tax exemption for discriminatory private school); Wisconsin v. Yoder, supra (claim for exemption from compulsory high school attendance); Sherbert v. Verner, 374 U.S. 398 (1963) (exemption claim relating to unemployment compensation law requiring claimant to be available to work on Saturday); Welsh v. United States, 398 U.S. 333 (1970) (conscientious objector claim); Tony and Susan Alamo Foundation v. Secretary of Labor, supra (exemption from Fair Labor Standards Act); People v. Woody, 394 P.2d 813 (Cal. 1964) (exemption from state ban on the use of peyote). In such cases, when free exercise objections to facially neutral state requirements are advanced, courts and

administrative agencies necessarily inquire into, and make judgments concerning, the basis of the constitutional claim. See Thomas v. Review Board, 450 U.S. 707 (1981) and Sherbert v. Verner, supra (unemployment boards); Seeger v. United States, 380 U.S. 163 (1965) (local draft board).

Both N.L.R.B. v. Catholic Bishop, 440 U.S. 490 (1979) and Ohio Civil Rights Commission v. Dayton Christian Schools, supra, indicate that there is no excessive entanglement in the inquiry into "objectively ascertainable facts," Alamo, 105 S.Ct. at 1961, that determine entitlement to exemption (e.g., will regulation infringe a sincerely held religious belief? what are the countervailing state interests?). Entanglement concerns may, of course, arise if regulatory burdens are actually imposed so as to enmesh courts or agencies in the ongoing religious activity of an organization, see N.L.R.B. v.

Catholic Bishop, supra, or in matters of church doctrine or internal authority structure. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).[34/] However, the initial determination whether an employee is engaged in a "religious" activity for purposes of determining whether a statutory or constitutional exemption should apply is not per se entangling, as appellants contend. The alternative they propose is to allow religious organizations to be entirely self-policing, a proposition in fundamental conflict with First Amendment law. E.g.,

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[34/] Although the Court has acknowledged the abstract possibility that inquiries arising in the course of enforcing asserted state jurisdiction "may" impinge on First Amendment rights, N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. at 502, it has never suggested that state jurisdiction cannot be invoked to inquire whether jurisdiction may be asserted. Moreover, the concern expressed in Catholic Bishop regarding the NLRB's remedial powers is inapposite here. The issue in this case is the constitutional authority to determine entitlement and exemption.

Tony and Susan Alamo Foundation v. Sec'y of Labor, supra; U.S. v. Lee, supra.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING MAYSON BACKPAY

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-421 (1975), this Court ennunciated a strong presumption in favor of backpay awards in order to make persons whole for injuries suffered on account of unlawful employment discrimination. In awarding Mayson backpay under the dictates of Albemarle, the district court properly exercised its equitable discretion to "make [him] whole."

The parties have stipulated that Mayson is entitled to $55,896 in wages, plus pension contributions. R. VI. at 139-42. Although this amount is substantial to a building engineer, it is inconsequential to the Church, which is blessed with vast resources

and in all likelihood has spent nearly that sum on attorneys' fees to contest the award.

The Church challenges the back pay award solely on the ground of its good faith.[35/] However, good faith is not a defense to a back pay remedy. Albemarle Paper Co. v. Moody, 422 U.S. at 422. And the exemption of section 713 of Title VII, 42 U.S.C. §2000e-12, applies only to the narrow and carefully circumscribed circumstances it addresses. In any event, it was not an abuse of discretion for the district court to award relief where no statutory provision precluded it expressly.

The Church attempts to undermine Title VII's make-whole mandate by citing City of Los Angeles Department of Water & Power v.

35/ The Church's good faith argument cannot even arguably apply to the period after the Court's January 11, 1984, decision adjudicating the unconstitutionality of Mayson's termination. Minimally, Mayson should at least receive back pay from this date.

Manhart, 435 U.S. 702 (1978) and Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983), rare departures from the ordinary remedial Title VII rule.[36/] In both these cases, however, which involved the unique circumstance of pension funds, the determining factor in the Court's ruling was the devastating effect on innocent third parties, and in Norris, on state and local governments, of ordering retroactive relief. Norris, 463 U.S. at 1105-1106; Manhart, 435 U.S. at 721-23. Here there are no similar equitable considerations because no third

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[36/] In the few reported cases amici found in which individual prevailing plaintiffs like Mayson were denied backpay, there were independent reasons which justified denial. Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980), cert. denied, 451 U.S. 971 (1981) (upholding district court's decision denying backpay because plaintiff did nothing to mitigate damages); Harper v. General Grocers Co., 590 F.2d 713 (8th Cir. 1979) (upholding district court's denial of backpay because plaintiff failed to introduce any evidence of loss of earnings); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978) (remanding for reconsideration district court's denial of backpay due to failure to mitigate damages).

party will be harmed by Mayson's back-pay award. Under the abuse of discretion standard, and to vindicate Title VII's mandate, Mayson's award should be upheld.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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